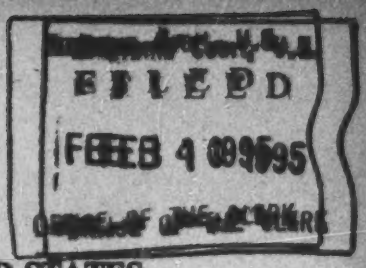
(4)

NO. 94-987



IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

WMX TECHNOLOGIES, INC.
WMI WASTE MANAGEMENT OF CANADA, INC.
WASTE MANAGEMENT OF MICHIGAN, INC.

Petitioners,

v.

CANADIAN GENERAL INSURANCE COMPANY, COMMERCIAL UNION ASSURANCE COMPANY OF CANADA, ROYAL INSURANCE COMPANY OF CANADA, WELLINGTON WELLINGTON INSURANCE COMPANY, AND AUTO OWNERS INSURANCE COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE NEW JERSEY SUPREME COURT

PETITIONERS' REPLY MEMORANDUM

Christopher M. McMurray
(Counsel of Record)
David M. Jones
Joel G. Beckman
KIRKPATRICK & LOCKHART
1800 M Street, N.W.
Washington, DC 20036
(202) 778-9000
and
One International Place
Boston, MA 02110
(617) 261-3100

Of Counsel:
Jerry F. English
COOPER, ROSE & ENGLISH
480 Morris Avenue
Summit, NJ 07901

15pp

TABLE OF CONTENTS

I. The Conflict of Authority Regarding the Territory of Coverage Rule Necessitates Resolution By the Court 1

II. Respondents' Reliance On The Court's Decisions In Burger King And World-Wide Volkswagen Is Misplaced And Provides No Basis For Denying Petitioners' Writ 6

TABLE OF AUTHORITIES

Cases

Asahi Metal Ind. v. Superior Court of California, 480 U.S. 102, 107 S. Ct. 1026 (1987) 6

Batton v. Tennessee Farmers Mut. Ins. Co., 153 Ariz. 268, 736 P.2d 2 (1987) 3, 5

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 105 S. Ct. 2174 (1985) 6, 7

Davis v. American Family Mut. Ins. Co., 861 F.2d 1159 (9th Cir. 1988) 5

Farmers Insurance Exchange v. Portage La Prairie Mutual Insurance Co., 907 F.2d 911 (9th Cir. 1990) 1, 2, 4, 9

Hanson v. Denckla, 357 U.S. 235, 78 S. Ct 1228 (1958) 1, 4

Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 104 S. Ct. 1868 (1983) 4

Hunt v. Erie Ins. Group, 728 F.2d 1244 (9th Cir. 1994) 5

International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, (1945) 1, 5

Keeton v. Hustler Magazine, Inc.,
465 U.S. 770, 104 S.Ct. 1473 (1984) 6

Kulko v. California Superior Court,
436 U.S. 84, 98 S. Ct 1690 (1978) 4

Magnus Maritec Int'l, Inc. v.
The SS Panteleimon, 444 F. Supp. 567
(S.D. Tex. 1978) 5

Marsh v. Farm Bureau Mut. Ins. Co.,
179 Wis. 2d 42, 505 N.W.2d 162 (1993),
rev. denied, 510 N.W.2d 137 (Wis.,
Nov. 15, 1993) 2, 5

McGee v. International Life Insur. Co.,
355 U.S. 220, 785 S. Ct. 199 (1957) 7, 8

Meyer v. Auto Club Ins. Ass'n, 492 So. 2d 1314
(Fla. 1986) 3, 5

Payne v. Motorists' Mutual Insurance Cos.,
4 F.3d 452 (6th Cir. 1993) 2, 4

Rambo v. American Southern Ins. Co.,
839 F.2d 1415 (10th Cir. 1988) 5

Rossman v. Consolidated Insur. Co.,
832 F.2d 282, 286 (4th Cir. 1987) 9

Szlay v. Handcock, 307 Ark. 232,
819 S.W. 2d 684 (1991) 8

Travelers Indemnity Co. v. Calvert Fire
Ins. Co., 798 F.2d 826 (5th Cir. 1986) 5

World-Wide Volkswagen Corp. v. Woodson,
444 U.S. 286, 100 S. Ct. 559 (1990) 6-9

Miscellaneous

Uniform Interstate and International
Procedures Act, § 1.03(a)(2) (1962) 8

W. Hoffman, Personal Jurisdiction Over Alien
Insurance Companies: The Territory-of-Coverage
Rule, 26 Tort & Insur. L.J. 703, 704 (1991)

I. The Conflict of Authority Regarding the Territory of Coverage Rule Necessitates Resolution By the Court.

Respondents[1] concede that a court has the power to exercise personal jurisdiction over any defendant that has "purposefully availed" itself of the benefits of the forum state. Hanson v. Denckla, 357 U.S. 235, 253, 78 S. Ct. 1228, 1240 (1958), citing International Shoe Co. v. Washington, 326 U.S. 310, 319, 66 S. Ct. 154, 159 (1945). Respondents contend, however, that there is no conflict among state and federal courts as to whether an express promise by an insurer to provide insurance services within the forum state (i.e. a territory of coverage provision) constitutes a "purposeful availment" of the benefits of the forum state and thus is a sufficient basis to permit the forum state to exercise jurisdictional power over the insurer.

Contrary to Respondents' assertions, there is a deeply divided split of authority among courts on this issue. In Farmers Insurance Exchange v. Portage La Prairie Mutual Insurance Co., 907 F.2d 911 (9th Cir. 1990) ["Farmers"], the Ninth Circuit held that a promise to provide insurance services in the forum state is purposeful availment:

> Portage's [the insurer's] territorial policy limit included Montana within its scope. Portage controlled its own amenability to suit. We therefore hold that Portage purposefully availed itself of the Montana forum when it contracted to indemnify and defend claims arising there.

---

[1] The five Respondents are Canadian General Insurance Company, Commercial Union Assurance Company of Canada, Royal Insurance Company of Canada and Wellington Insurance Company (collectively, the "Canadian Respondents"), and Auto Owners Insurance Company ("Auto Owners").

In accordance with Rule 29.1, the parent companies or subsidiaries of Petitioners are identified in Petitioners' Writ of Certiorari ("Petitioners' Writ") at 2 n.2.

Id. at 914. The Sixth Circuit Court of Appeals came to the same conclusion in Payne v. Motorists' Mutual Insurance Cos., 4 F.3d 452 (6th Cir. 1993)["Payne"]:

> [The insurer] purposefully availed itself of the Tennessee forum by contractually providing explicit insurance coverage for any accidents in Tennessee. The fact that [the insurer] chose to provide coverage for all fifty states . . .constitutes purposeful availment of any individual state's forum.

Id. at 456. The view of Farmers and Payne is the majority view of the jurisdictional import of the territory of coverage provision. W. Hoffman, Personal Jurisdiction Over Alien Insurance Companies: The Territory-of-Coverage Rule, 26 Tort & Insur. L.J. 703, 704, 709 (1991) ("the majority of U.S. courts that have addressed the issue to date holds that the inclusion of the forum state in the territory of coverage of an insurance policy may support jurisdiction over an alien insurer" because "the insurer's act of insuring a risk that may be realized in the forum state satisfies the constitutional requirement of 'purposeful availment'").

In sharp contrast, the Court of Appeals of Wisconsin held that the inclusion of the forum state within the territory of coverage clause did not constitute purposeful availment with the forum state. Marsh v. Farm Bureau Mut. Ins. Co., 179 Wis. 2d 42, 505 N.W.2d 162, 167 (1993), rev. denied 510 N.W.2d 137 (Wis. Nov. 15, 1993) ["Marsh"] ("[t]he insurance contract does not evince a purposeful availment of the benefits of doing business in Wisconsin"). Similarly, the Supreme Court of Arizona rejected the exercise of in personam jurisdiction on the basis of an insurer's promise to provide insurance services in the forum state, reasoning as follows:

> Extension of nationwide coverage by an insurer may make lawsuits by insureds in foreign jurisdictions reasonably foreseeable, but state jurisdiction over foreign defendants is impermissible unless the defendant. . .has purposefully directed its activities at the forum state.

Batton v. Tennessee Farmers Mut. Ins. Co., 153 Ariz. 268, 272, 736 P.2d 2, 6 (1987) ["Batton"]; accord Meyer v. Auto Club Insur. Ass'n, 492 So. 2d 1314, 1315 (Fla. 1986) ("the respondent, having no contact with Florida, therefore, had no reasonable anticipation of being subjected to defending a suit in Florida courts").

Rather than acknowledging this conflict in the authorities, Respondents attempt to disguise it by focusing on contacts of policyholders or of third parties with the forum. According to the Canadian Respondents:

> In every decision cited by Petitioners, there was, in addition to a territory of coverage clause, a significant forum contact by the insurer, typically an auto accident in the forum. That accident in turn gave rise to a coverage dispute between the insured and insurer, in the same forum.

(Canadian Respondents' Opposition to Petitioners' Writ ("Canadian Respondents' Opposition") at 8 (emphasis added).)[2]

---

[2] Respondent Auto Owners takes a similar position:

> There is no conflict in state and federal court decisions with respect to whether personal jurisdiction can be exercised based upon a territory of coverage clause in an insurance policy, in the absence of a forum accident.

(continued...)

The fallacy in Respondents' position is that an "accident" in the forum state is not a "significant forum contact" by the defendant insurer. It is a contact by the plaintiff policyholder. The "accident," in all cases, arose entirely from the activity of the policyholder or third parties, not from any activity of the insurer. Indeed, in each of the cited cases the insurer had done nothing in the forum other than (1) promise, in the territory of coverage provision in its insurance policy, to defend and indemnify claims in the forum and (2) appear in the forum to challenge jurisdiction over its person.

When the courts in Farmers, Payne, and the cases adopting the same rationale (see Petitioners' Writ at 11-12) ruled that the insurer's promise of coverage within the forum state was "purposeful availment," they could not have been relying on the fact of the policyholder's accident in the forum. It is fundamental hornbook law that the "unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction." Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 417, 104 S. Ct. 1868, 1873 (1983) (emphasis added), citing Kulko v. California Superior Court, 436 U.S. 84, 93, 98 S. Ct 1690, 1697 (1978) and Hanson v. Denckla, 357 U.S. 235, 253, 78 S. Ct 1228, 1239 (1958).

Moreover, even the cases which did not uphold a court's power to exercise in personam jurisdiction based on the territory of coverage provision -- that is, the decisions which have adopted Respondents' position on the merits of this jurisdictional dispute -- have recognized that the occurrence of the policyholder's

---

[2](...continued)
(Auto Owners' Opposition to Petitioners' Writ ("Auto Owners' Opposition") at 9 (emphasis in original).)

accident in the forum state is irrelevant in assessing a court's personal jurisdiction power over the insurer. Hunt v. Erie Ins. Group, 728 F.2d 1244 (9th Cir. 1994); Batton v. Tennessee Farmers Mut. Ins. Co., 153 Ariz. 268, 736 P.2d 2 (1987); Meyer v. Auto Club Ins. Ass'n, 492 So. 2d 1314 (Fla. 1986); Marsh v. Farm Bureau Mut. Ins. Co., 179 Wis. 2d 42, 505 N.W.2d 162 (1993), rev. denied, 510 N.W.2d 137 (Wis., Nov. 15, 1993).[3]

In short, the situs of the policyholder's accident within or without the forum state cannot harmonize the two conflicting lines of authority as to the jurisdictional import of the territory of coverage provision because the situs of the policyholder's activities is of no constitutional significance as to the forum state's jurisdictional power over the defendant insurer.

The Respondents next attempt to distinguish the cases adopting the territory of coverage rule by focusing on yet another factor constitutionally irrelevant to the issue of the forum state's power over the defendant -- the residency of the plaintiff. The Canadian Respondents thus state that "in three of the four federal cases cited by Petitioners, the insured against event also occurred in the forum state, but the plaintiff was a resident of the forum, and the courts, therefore, found that an assertion of jurisdiction was proper. It is residency and its effect on the issue of purposeful availment that was dispositive in these cases." (Canadian Respondents' Opposition at 8.)

---

[3] Canadian Respondents also cite three cases in which a territory of coverage clause was not even at issue. Davis v. American Family Mut. Ins. Co., 861 F.2d 1159 (9th Cir. 1988); Rambo v. American Southern Ins. Co., 839 F.2d 1415 (10th Cir. 1988); Travelers Indemnity Co. v. Calvert Fire Ins. Co., 798 F.2d 826 (5th Cir. 1986); Magnus Maritec Int'l, Inc. v. The SS Panteleimon, 444 F. Supp. 567 (S.D. Tex. 1978).

Respondents miss the point: if defendant's contacts with the state are insufficient for the forum court to assert jurisdiction, the fact that the plaintiff is a forum resident cannot change the result. Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 104 S. Ct. 1473 (1984).

Petitioners acknowledge that the situs of the policyholder's accident and the residence of the policyholder plaintiff are factors that may have bearing on the reasonableness of asserting jurisdiction, as distinguished from the forum state's power to exercise jurisdiction. As this Court has stated, "[o]nce it has been decided that a defendant has purposefully established minimum contacts with the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475-76, 105 S. Ct. 2174, 2184 (1985), quoting International Shoe Co. v. Washington, 326 U.S. 310, 320, 66 S. Ct. 154, 160 (1945) (emphasis added). The determination of the reasonableness of the state court's power to exercise in personam jurisdiction depends upon the evaluation of such factors as the burden on the defendant, the interests of the forum state in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive policies. Asahi Metal Ind. v. Superior Court of California, 480 U.S. 102, 113, 107 S. Ct. 1026, 1033 (1987), quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292, 100 S. Ct. 559, 564 (1990).[4]

---

[4] The foregoing reasonableness considerations "sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." Burger King, 471 U.S. at 477, 105 S. Ct. at 2184, citing McGee v. International Life

(continued...)

In the case at bar, the reasonableness of asserting jurisdiction is not at issue. The trial court held that there were compelling reasons for New Jersey to assert jurisdiction. (App. at 16A-17A, 22A-23A.) The New Jersey Supreme Court did not upset that finding; it simply held that the trial court lacked power to exercise jurisdiction, no matter how reasonable it would have been to do so. Moreover, Respondents have not argued, and could not credibly argue, that the assertion of in personam jurisdiction over them would be unreasonable. Requiring Respondents to appear in the courts of New Jersey could not conceivably impair in any way their ability to defend claims against them. Indeed, any such claim of inconvenience by these multi-million dollar commercial enterprises -- many of which are constituents of some of the largest families of insurance entities in the world -- would be ludicrous. That is why the New Jersey Supreme Court found Respondents' similar arguments -- recast as forum non conveniens objections -- to be "flimsy at best." (App. at 69A.)

II. Respondents' Reliance On The Court's Decisions In Burger King And World-Wide Volkswagen Is Misplaced And Provides No Basis For Denying Petitioners' Writ.

Citing out of context the Court's reasoning in Burger King, Respondents contend that a contract, standing alone, is

---

*(...continued)

Insur. Co., 355 U.S. 220, 78 S. Ct. 199 (1957) (the insurance contract at issue was held to have a "substantial connection" with the forum state even though the defendant insurer's contact with the forum state was limited to delivering the insurance policy in the forum state to the insured). In complex, multi-party insurance coverage cases, such considerations overwhelmingly favor exercising personal jurisdiction over alien insurers. (Trial Court Opinion, Petitioners' Writ at Appendix ("App.") at 16A-17A; Petitioners' Writ at 6-8, 21-22.)

insufficient to confer personal jurisdiction. (Auto Owners' Opposition at 6-7; Canadian Respondents' Opposition at 5.) On the contrary, this Court has long recognized that a contract may constitute sufficient minimum contacts to empower a court to exercise in personam jurisdiction. McGee v. International Life Ins. Co., 355 U.S. 220, 78 S. Ct. 199 (1957). Moreover, Respondents ignore that the appropriateness of exercising jurisdiction over a non-resident to enforce contracts to supply services within the forum is recognized in many state long arm statutes. See Uniform Interstate and International Procedures Act, § 1.03(a)(2) (1962); see also Szlay v. Handcock, 307 Ark. 232, 819 S.W. 2d 684 (1991) (territory of coverage clause constituted a promise to perform services within the forum state and, thus, the exercise of jurisdiction under the state long arm statute was proper). Suits on insurance policies are not entitled to less favored treatment under the Due Process Clause than suits under ordinary service contracts.

Further, Canadian Respondents, citing World-Wide Volkswagen, argue:

> A nationwide chain of service centers is closely analogous to the "nationwide promise of insurance services" posited by Petitioners as a contact created by a territory of coverage clause. In World-Wide Volkswagen, this Court rejected a contact of this nature as too attenuated to support a finding of jurisdiction, a holding which should govern here.

(Canadian Respondents' Opposition at 6.) The Court should not be swayed by such a superficial interpretation of World-Wide Volkswagen. Indeed, Respondents' argument has been explicitly addressed and rejected by the lower courts:

> Unlike the automobile sellers in World-Wide Volkswagen, automobile liability insurers contract to indemnify and defend the insured for claims that will foreseeably result in litigation in foreign states. Thus, litigation requiring the presence of the insurer is not only foreseeable, but it was purposefully contracted for by the insurer. Moreover, unlike a product seller or distributor, an insurer has the contractual ability to control the territory into which its "product" -- the indemnification and defense of claims -- will travel.

Farmers Insur. Exch. v. Portage La Prairie Mut. Insur. Co., 907 F.2d at 914; see also Rossman v. Consolidated Insur. Co., 832 F.2d 282, 286 (4th Cir. 1987) (the insurer's expectation of being haled into court in a foreign state, an express feature of its policy, is different than the ability of a distributor to foresee claims in a foreign state).

The Court has never addressed the constitutionality of the territory of coverage rule. While Respondents gloss over the conflict in the lower courts, "[u]ntil the Supreme Court affirmatively endorses or rejects the territory-of-coverage rule in an international case, the question of whether such clauses alone establish 'minimum contacts' will, no doubt, continue to rise." W. Hoffman, The Territory-of-Coverage Rule, supra at 716. Accordingly, the Court should grant certiorari to resolve this conflict, particularly in view of the increasing volume of comprehensive insurance coverage litigation throughout the country.

Respectfully submitted,

Christopher M. McMurray
(Counsel of Record)
KIRKPATRICK & LOCKHART
1800 M Street, N.W.
Washington, DC 20036
(202) 778-9000

David M. Jones
Joel G. Beckman
KIRKPATRICK & LOCKHART
One International Place
Boston, MA 02110
(617) 261-3100

Of Counsel:

Jerry Fitzgerald English
COOPER, ROSE & ENGLISH
408 Morris Avenue
Summit, NJ 07901
(908) 273-1212